IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NFL PROPERTIES LLC, and PITTSBURGH STEELERS SPORTS, INC., Plaintiffs,	:	No. 05-0067
v.	:	ELECTRONICALLY FILED
NICHOLAS WOHLFARTH and JENNIFER WOHLFARTH D/B/A TURTLE CREEK SPORTSWEAR, Defendants.	:	

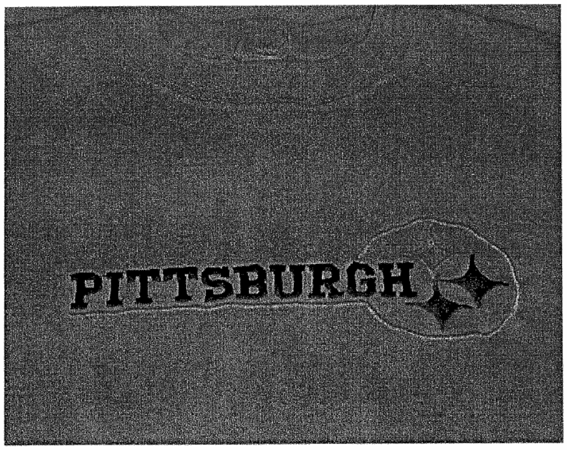
REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR CONTEMPT AND SANCTIONS

The NFL submits this reply memorandum of law in further support of the motion to hold Turtle Creek in civil contempt.[1] Turtle Creek's opposition rests on misstatements of law and fact. It cannot be relied upon by the Court and underscores why contempt and sanctions are appropriate remedies. This Reply sets the record straight on five points:

First, there is no merit to Turtle Creek's contention that it did not violate the Final Order because it somehow still is permitted to sell merchandise using the Steelers' colors and/or the word "Pittsburgh" coupled with the Steelers' famous "hypocycloid" logo, so long as it omits the word "Steelers." (Opp. at 2.) This ignores that one of the products at issue – a gray sweatshirt with the word "Pittsburgh" in black letters jutting into the hypocycloid logo – is identical to one of the products that was expressly enjoined, on consent, in the 2005 Final Order. This sweatshirt was explicitly identified as an example of "existing merchandise" making "use of the NFL Marks in a manner prohibited" by the Final Order. (Jan. 3, 2011 Declaration of Brian

[1] This reply incorporates the definitions used in the NFL's January 3, 2011 moving papers.

Simmons ("Simmons Decl."), Ex. A, Fig. 2.). A side-by-side comparison shows the products are the same:

Product at issue in 2005 that was expressly enjoined in the Final Order (Simmons Decl., Ex. A at Fig. 2.)	Product purchased by NFL's investigator on December 22, 2010. (Jan. 3, 2011 Declaration of Jeffrey Klink ("Klink Decl."), Ex. A.)
Figure 2: Gray sweatshirt with the word "Pittsburgh" emblazoned in black letters and the hypocycloid diamonds logo. 	PITTSBURGH

This alone merits contempt. Nowhere in its opposition papers does Turtle Creek acknowledge that these products are identical. Instead it reargues the issue of infringement, contending that it is not in contempt because "[n]o reference to football, the National Football League or the Steelers" appears on its merchandise. (Opp. at 2.) That, of course is no longer the issue. Because Turtle Creek is bound by its 2005 consent to the Final Order, those arguments are foreclosed and a ruling that "the products…are no [sic] infringing" (Opp. at 7) is not available to Turtle Creek. *Harley Davidson, Inc. v. Morris*, 19 F.3d 142, 149 (3d Cir. 1994).

Second, in addition to being foreclosed as a matter of law, Turtle Creek's arguments of non-infringement fail on the merits. The Third Circuit is clear on this: Minor modifications – such as those made by Turtle Creek when it removed "Steelers" from the team's iconic hypocycloid trademark, while juxtaposing the hypocycloid diamonds with "Pittsburgh" in Steelers black – do not protect infringers. *See McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC*, 511 F.3d 350, 367-69 (3d Cir. 2007) (sale of private label artificial sweetener infringed trade dress in Splenda notwithstanding minor differences in packaging). It is neither credible nor reasonable for Turtle Creek to argue that, even in modified form, its merchandise does not communicate "Steelers" to the unsuspecting public.

Third, Turtle Creek's focus on "non-competing goods" (Opp. 7-8) is also substantively incorrect. Turtle Creek's contention that licensed NFL goods are not sold in grocery stores (Opp. at 7 & Ex. 4) is simply wrong. Officially licensed NFL merchandise is sold at the same grocery store where Turtle Creek's items were being sold – the record on that is crystal clear. (Klink Decl. ¶ 9, Ex. C.) In any event, whether goods compete does not turn on a grocery store vs. sporting goods store distinction, but on "the nature of the products themselves" and the "context" surrounding their marketing and sale. *Checkpoint Sys., Inc. v. Check Point Software Tech., Inc.*, 269 F.3d 270, 280-81 (3d Cir. 2001) (citation omitted). If it were otherwise, potato chips sold in grocery stores would be deemed not to compete with potato chips sold at Pittsburgh International Airport, a plainly absurd result. The crucial point for purposes of this motion is that Turtle Creek sells unauthorized souvenir merchandise that copies the trade dress and core elements of the Steelers' trademark and competes with authorized Steelers merchandise, wherever that merchandise is available for sale. That violates the Final Order and the Lanham Act. *McNeil*, 511 F.3d at 367-69.[2]

Fourth, Turtle Creek's assertion that "sometime in November" it purportedly "pulled all merchandise" to which the NFL objected (Opp. at 7) is false. On its face, the statement rings hollow given the clear record that Turtle Creek avoided all substantive responses when the NFL repeatedly tried to resolve this matter short of bringing this motion. More importantly,

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[2] In addition to being wrong, the carefully nuanced hearsay statements by Nicholas Wohlfarth (Opp. Ex. 4) about what "at one time" supposedly was a "policy" about where licensed merchandise could be sold is classic hearsay that cannot be considered on this motion, whether presented in writing or in person. *Cannon v. Cherry Hill Toyota, Inc.*, 190 F.R.D. 147, 158 (D.N.J. 1999).

Investigator Klink found Turtle Creek merchandise at two stores in the Pittsburgh area on December 22, 2010. (Klink Decl. ¶¶ 2-9.) Even giving Turtle Creek every benefit of the doubt and assuming – despite all evidence to the contrary – that it might have pulled some merchandise, it plainly never pulled "all" infringing merchandise. Instead, it left infringing merchandise in stores at least through the Christmas shopping season.

Fifth, Turtle Creek's last two points, about "discussions" with Steelers player Hines Ward's representatives (Opp. at 6 & Ex. 2) and about the "Fleur de Lis" (Opp. at 6-7 & Ex. 3), are irrelevant. The letter from Mr. Ward's counsel shows only that, like the NFL, Mr. Ward is another victim of Turtle Creek's unlawful conduct who is taking appropriate steps to protect his rights. The use of "Who Dat" and the fleur-de-lis by New Orleans-area T-shirt sellers (Opp. Ex. 3) has nothing to do with the Final Order issued by this court, or with the conduct by Turtle Creek that violates the Final Order and the Lanham Act.

[signature page follows]

CONCLUSION

For the reasons set forth above and in the NFL's original memorandum, the NFL respectfully requests that the Court grant its Motion for Contempt and Sanctions or enter an Order setting a date and time for an evidentiary hearing at the Court's earliest convenience.

Respectfully submitted,

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